MULTI-PURPOSE BANK BHD

v.

MAIMOON ABDUL RAZAK

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[ORIGINATING SUMMONS NO: S5-24-867-1997]
26 MAY 1999

LAND LAW: *Charge - Foreclosure - Third party charges - Whether written notice of demand a pre-requisite to issuance of Form 16D notice - Whether chargee could vary factor for computing interest without consent of chargor - National Land Code 1965, s. 254(1), Form 16D*

The plaintiff had sought to foreclose the property of the defendant, over which third party charges were created by the defendant in favour of the plaintiff. The defendant opposed the application, and argued before the learned judge, *inter alia,* that the plaintiff, without her consent, had altered the method of 'computation of interest' of the loan in question, and by that, had given an incorrect figure of the outstanding sum due under the charge. It was further argued that such incorrect outstanding sum due had also affected the correctness of the sum stated to be due in the Form 16D, such as to render the said statutory notice invalid. The facts showed however that cls. 1(B)(i)(a) and 5(a) of the annexure to the first charge had empowered the plaintiff to vary the 'prescribed rates of interest' unilaterally and without any notice to the defendant. That being so, questions *inter alia* arose as to: (i) whether it was open for plaintiff in the circumstances to have varied the 'factor to calculate the interest' in question; (ii) whether the defendant had proved the existence of a 'cause to the contrary' such as to defeat the application for foreclosure herein.

Held:

[1] There is no requirement under the National Land Code for a written notice of demand to be served on a chargor prior to issuance of a notice in Form 16D. Service of a notice in Form 16D is sufficient in law to fulfill the making of a demand on a chargor before the commencement of a foreclosure action.

[2] There is a great difference between the rates of interest and the factor relied on to calculate such rates. A change of either one of these can substantially alter any calculation. On the facts, although the plaintiff was entitled under cl. 5(a) to arbitrarily vary the interest, such an entitlement was restricted only to the variation of "the rate of interest" and not the factor for computing such rate.

[3] Upon the limited application of cl. 5(a), the plaintiff's calculation of interest herein was based on a factor that was not permitted by mutual consent of the parties, and it thus constituted a cause to the contrary.

[4] It was immaterial whether or not the defendant would have benefited from the substitution of the factor used to calculate the rate of interest. A change in the factor used to calculate the rate of interest, cannot be permitted unless agreed upon by the parties. Such a change may have an adverse effect on the calculation of the outstanding sum, which may on the contrary, and in certain situations, be disadvantageous to the chargor.

[Application dismissed.]

Case(s) referred to:
Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144 ***(foll)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(foll)***

Legislation referred to:
National Land Code 1965, s. 254(1)

For the plaintiff - KT Ho; M/s Wong & Cheng Kiat
For the defendant - Haris Ibrahim; M/s Haris & Co

Reported by WA Sharif

JUDGMENT

James Foong J:

Introduction

This is a foreclosure action by the plaintiff, a bank, against the defendant, the owner of a piece of property held under HS (D) 70915 for PT 3517, Mukim and District of Kuala Lumpur, State of Wilayah Persekutuan (the property). It is on two third party charges created by the defendant in favour of the plaintiff over the property for facilities granted to a third party, the defendant's husband.

Encik Haris, counsel for the defendant, advanced three grounds in his attempt to defeat this plaintiff's application. I shall deal with each of them in turn.

1st No Letter Of Demand

The first point raised is that the plaintiff has not forwarded to the defendant a letter of demand which, according to Encik Haris, should precede the service of Form 16D of National Land Code (NLC) on the defendant. To support this, he cited a passage from the Federal Court judgment of Justice Gopal Sri Ram in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 where at p. 83 it states:

> failure on the part of the chargee to prove **the making of a demand** or service upon the chargor of a notice in Form 16D would constitute a cause to the contrary. (emphasis added).

I see no merits in this contention. There is no provision in the NLC which insists on a prior written notice of demand separate from that of Form 16D before the issuance of this statutory notice. And even reading the above phrase of the Federal Court, I cannot find any indication of such a prerequisite. The conjunctive word 'or' is used between "the making of a demand" and "service upon the chargor of a notice in Form 16D." Thus when the latter is carried out it is sufficient by law to fulfill the making of a demand on the chargor before commencement of foreclosure action. In this case, Form 16D was used and was duly served on the defendant thereby amply satisfying the requirement under s. 254(1) NLC.

Misrepresentation

The second matter raised is an allegation by the defendant that she was misrepresented by the plaintiff to execute the second charge. She pointed out that though the annexure in the second charge declares that it was created in consideration of an overdraft facility of RM170,000 to be granted to her husband but in reality it was to provide additional security for other unsecured loans granted by the defendant to her husband which were already utilised by him and where he had defaulted in repaying.

The plaintiff denied this accusation and explained that though they had extended temporary overdraft facilities to the husband these were secured by distinctive Fixed Deposit receipts and, at a time, these facilities were given pending the approval of a higher amount of overdraft facilities.

I accept this explanation of the plaintiff after perusing the supporting documents annexed to its affidavit. This allegation of the defendant, in my view, is concocted; merely an attempt to frustrate the plaintiff's contractual rights to enforce its security.

Computation Of Interest

The third issue centres on the word "per annum" in cl. 1(B)(i)(a) of the annexure to the first charge. Here for the term loan of RM160,000, interest payable is 1.75% "above the prevailing Base Lending Rate (concurrently at six point five five per centum (6.55%) per annum". But the plaintiff had, subsequent to this agreement, varied this calculation of interest to be based on: "monthly rest." To this, Encik Haris protested: that the plaintiff cannot, except by consent from the defendant, alter such method of computation, and such permission was never obtained from the defendant; by adopting this new

computation, the outstanding sum due under the charge is incorrect thereby also affecting the correctnesses of the sum due stated in the Form 16D served on the defendant; consequently this statutory notice becomes ineffective and invalid rendering no support to this plaintiff's application.

Mr Ho, counsel for the plaintiff, hastily retorted by pointing out two provisions in the annexure where the plaintiff can, without prior notice to the defendant, vary such interest from time to time. The first is in cl. 1(B)(i)(a) right below what was quoted above where it continues with:

> where and when applicable such other rate as may from time to time and at any time be varied and substituted therefore in the manner hereinafter provided.

Then in cl. 5(a) it is printed:

> Notwithstanding the provisions relating to the rate of interest as hereinbefore provided the chargee shall be entitled at any time or from time to time to vary at its sole and absolute discretion the Prescribed Rates without notice to the chargor(s) ...

This, argued Mr Ho, allows the plaintiff to alter the interest rate by agreement with the defendant.

Encik Haris then immediately contested that these clauses only entitled the plaintiff to vary the rates of interests but not the computation.

I am of the view that there is great force in Encik Haris's argument. There is a great difference between the rates of interest and the factor relied on to calculate such rates. A change of either one of these can substantially alter any calculation. Though cl. 5(a) of the annexure allows the plaintiff to arbitrarily vary the interest, however it is certainly restricted only to "the rate of interest" as the clause declares. There is no reference made herein to allow the variation of the factor of computing such rate. Though I noticed that under cl. 1(B)(i)(a) of the annexure carries the words "be varied and substituted" which may imply a wider meaning to include the factor of calculating the rate of interest, this is dependent on "the manner hereinafter provided" as the sentence continues. And what is the manner hereinafter provided? To my reading of the annexure, it must be associated with cl. 5(a). And as I have explained above, this provision (cl. 5(a)) is only of limited application. Since the plaintiff has proceeded to base its calculation of interest on a factor that is not permitted by mutual consent of the parties and claiming such amount as due and owing in the statutory notice (Form 16D NLC), then it is a cause to the contrary in refusing this application. This view is supported by the Federal Court judgment in *Low Lee Lian v. Ban Hin Lee Bank Bhd (supra)* affirming the decision of the Justice Lim Beng Choon *(supra)* in *Co-operative*

Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 MLJ 283 where the bank failed to succeed in a foreclosure action against the chargor when default interest which the bank was not entitled to was included in the outstanding sum claimed under Form 16D NLC. I would further wish to add that it is immaterial whether the chargor would benefit by this substituted factor of calculating rate of interest (as in this case, the defendant will be paying a lower interest). What is more important is that no change can be permitted unless agreed upon. To compromise this may have an adverse effect when the calculation of outstanding sum may on the contrary, in certain situation be a disadvantage to the chargor.

Conclusion

Accordingly, I hereby dismiss this plaintiff's application for foreclosure in encl. 1 with costs.